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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MAHEALANI LEIALOHAKALA
AUSTIN,

Defendant and Appellant.

B288705

(Los Angeles County
Super. Ct. No. MA062046-
01)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Charles Chung, Judge. Dismissed.

Heather J. Manolakas, under appointment by the Court of
Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

INTRODUCTION

Defendant Mahealani Austin pled guilty to second degree robbery, attempted robbery, conspiracy, and kidnapping, and admitted that he personally used a firearm in some of those crimes; in exchange, he received a sentence of 35 years. We affirmed his conviction in a separate appeal. (*People v. Austin* (Mar. 2, 2018, No. B282537) [nonpub. opn.].)

While that appeal was pending, appellant petitioned the trial court for resentencing under Penal Code section 12022.53, which had recently been revised.¹ The trial court denied his petition. Appellant appealed, and his appointed counsel filed a brief requesting that we independently review the record for error pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).

We dismiss the appeal. A criminal defendant is entitled to review under *Wende* on a first appeal as a matter of right. As this is an appeal from a petition for resentencing, not a first appeal as a matter of right, appellant is not entitled to *Wende* review. As neither appellant nor his counsel have asserted any appealable issues, dismissal is appropriate.

FACTUAL AND PROCEDURAL BACKGROUND

We described the underlying case from our prior opinion, *People v. Austin, supra*, (March 2, 2018, B282537) (nonpub. opn.) as follows: Appellant Mahealani Leialohakala Austin and two codefendants used a gun to steal money from several Antelope Valley pharmacies and pizza restaurants during 2011 and 2012.

¹All further statutory references are to the Penal Code unless otherwise indicated.

A 31-count information filed July 17, 2014 charged the trio with numerous counts of second degree robbery and kidnapping to commit robbery, as well as other related offenses, including conspiracy to commit robbery and making criminal threats, plus firearm enhancements. All three defendants faced life in prison due to the aggravated kidnapping charges, which the court declined to dismiss pursuant to defendants' section 995 motions.

Pursuant to a plea agreement, appellant pled no contest to one interlineated count of kidnapping (Pen. Code, § 207, subd. (a)), three counts of robbery (§ 211), one count of attempted robbery (§§ 211 & 664), and one count of conspiracy to commit robbery (§§ 182, subd. (a) & 211). He also admitted section 12022.53, subdivision (b) allegations as to each count. In exchange, he was sentenced to a term of 35 years, calculated as follows: the high term of eight years on the kidnapping count, plus an additional 10 years for the related firearm enhancement [under section 12022.53, subdivision (b)]; one year—one-third the midterm—on each of the three robbery counts, plus three years, four months—one-third the midterm—on each of the related firearm enhancements [under section 12022.53, subdivision (b)]; eight months—one-third the midterm—on the attempted robbery, plus three years, four months—one-third the midterm—on the related firearm enhancement [under section 12022.53, subdivision (b)]; and the mid-term of three years on the conspiracy count, to run concurrent to all of the other charges. [End of quotation from *People v. Austin, supra.*] Appellant appealed, and we affirmed the conviction. (*Ibid.*)

While that appeal was pending, section 12022.53 was revised by Senate Bill No. 620 (2017-2018 Reg. Sess.).

(§ 12022.53, subd. (h); as amended by Stats. 2017, ch. 682, § 2.) The revision gave the trial court discretion, in limited circumstances, to strike a firearm enhancement in the interest of justice. In February 2018 defendant filed a petition for resentencing under section 12022.53, subdivision (h). The court denied defendant's request, stating, "The request to strike the gun allegation is denied. The defendant entered into a negotiated disposition."

Appellant timely appealed and requested a certificate of probable cause. No certificate of probable cause or ruling on appellant's request for a certificate is included in the record on appeal.

DISCUSSION

"In an indigent criminal defendant's first appeal as a matter of right, the Court of Appeal must independently review the record if appointed counsel represents he or she has found no arguable issues. (*Anders v. California* (1967) 386 U.S. 738, [18 L.Ed.2d 493, 87 S.Ct. 1396] (*Anders*); [*Wende, supra*,] 25 Cal.3d 436.)" (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 535 (*Ben C.*)). "*Anders* established a prophylactic framework that is relevant when, and only when, a litigant has a previously established constitutional right to counsel." (*Pennsylvania v. Finley* (1987) 481 U.S. 551, 555.) "[T]he right to appointed counsel extends to the first appeal of right, and no further." (*Ibid.*; see also *In re Sade C.* (1996) 13 Cal.4th 952, 978 [*Anders's* "'prophylactic' procedures" apply in a criminal defendant's "first appeal as of right."].)

Thus, a defendant is entitled to *Anders/Wende* review in "a first appeal of right" from a criminal conviction, but is not entitled to such review "in subsequent appeals." (*People v.*

Serrano (2012) 211 Cal.App.4th 496, 503 (*Serrano*); see also *People v. Kisling* (2015) 239 Cal.App.4th 288, 290 (*Kisling*) [*Anders/Wende* procedures do not apply to an appeal from the denial of a defendant's petition for release from his commitment as a sexually violent predator.].)

Defendant's appeal from the denial of his petition for resentencing, "although originating in a criminal context, is not a first appeal of right from a criminal prosecution, because it is not an appeal from the judgment of conviction." (*Serrano, supra*, 211 Cal.App.4th at p. 501.) Because defendant has no constitutional right to counsel in an appeal from an order denying his petition for resentencing under the revised section 12022.53, he "is not entitled to *Anders/Wende* review when appointed counsel finds no arguable issues on appeal." (*Serrano, supra*, 211 Cal.App.4th at p. 501.) In this situation, "[d]ismissal of an appeal raising no arguable issues" is appropriate, as "[n]othing is served by requiring a written opinion when the court does not actually decide any contested issues." (*Ben C., supra*, 40 Cal.4th at p. 544.)

Defendant's appointed counsel complied with her duty to review the record and found no arguable issues. Counsel also notified defendant of his right to file a supplemental brief raising any substantive issues; he has not done so. Because neither defendant nor his counsel has raised any claims of error, we dismiss the appeal as abandoned. (See *Serrano, supra*, 211 Cal.App.4th at pp. 503-504; see also *Kisling, supra*, 239 Cal.App.4th at p. 292 & fn. 3.)

DISPOSITION

The appeal is dismissed.

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COLLINS, J.

We concur:

MANELLA, P. J.

CURREY, J.